

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

ISSUE

The issue is whether OWCP properly determined appellant's request for reconsideration, finding that it was untimely failed and failed to establish clear evidence of error.

FACTUAL HISTORY

On December 22, 2015 appellant, then a 57-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that on December 15, 2015 he strained his right side groin and right pelvis pulling wet linen while in the performance of duty.

By development letter dated December 29, 2015, OWCP advised appellant of the deficiencies of his claim. It requested additional factual and medical evidence from him and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

On December 18, 2015 L. Grant Trevor, a physician assistant, provided work restrictions. In a note dated December 18, 2015, Dr. Joseph J. Antinori, a Board-certified family practitioner, diagnosed a hernia and provided work restrictions. On December 23, 2015 Dr. Gil Carter, a Board-certified family practitioner, opined that appellant should not lift, pull, drag, or push until February 1, 2016. Appellant underwent an abdominal computerized tomography scan on December 23, 2015 which did not demonstrate an inguinal hernia.

On January 7, 2016 appellant completed OWCP's questionnaire and denied any previous similar condition. He also provided a narrative statement and alleged that on December 15, 2015 he was pulling a cart filled with heavy wet linen while in the performance of duty. Appellant alleged that he pulled his groin. He specified that, while pulling a bag of soiled linen from one of the bins and twisting to his left, he felt pain in his groin area severe enough that he dropped the bag he was handling. Appellant alleged that he had sustained a hernia. He also provided work restrictions dated February 2, 2016 from Dr. Carter.

By decision dated February 3, 2016, OWCP denied appellant's claim, finding that he had not established a hernia causally related to his accepted December 15, 2015 employment incident.

On February 5, 2018 appellant, through counsel, requested reconsideration of the February 3, 2016 decision. Counsel summarized a December 18, 2015 note from Dr. Antinori and a December 23, 2015 note from Dr. Carter. He contended that the medical evidence of record

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

established causal relationship between appellant's diagnosed hernia condition and his accepted employment activities on December 15, 2015.

By decision dated June 26, 2018, OWCP denied appellant's request for further merit review finding that his request was untimely filed and failed to demonstrate clear evidence of error. It noted that the medical reports referenced and summarized by counsel in his request for reconsideration were not documented in the case record.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁵ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System.⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁸ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the

⁴ 5 U.S.C. § 8128(a); *S.C.*, Docket No. 18-0126 (issued May 14, 2019); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁷ *S.C.*, *supra* note 4; *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *S.C.*, *id.*; *M.H.*, Docket No. 18-0623 (issued October 4 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *S.C.*, *id.*; *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁰

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹¹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹²

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations¹³ and procedures¹⁴ establish a one-year time limitation for requesting reconsideration, which begins on the date of the last OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵ The most recent merit decision was OWCP's February 3, 2016 decision which found that the evidence of record was insufficient to establish causal relationship. As appellant's request for reconsideration was not received by OWCP until February 5, 2018, more than one year after the February 3, 2016 decision, the Board finds that it was untimely filed. Because his request was untimely, he must demonstrate clear evidence of error on the part of OWCP in having denied his traumatic injury claim.

The Board further finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision. OWCP denied his traumatic injury claim as the medical evidence of record failed to establish a causal relationship between the diagnosed conditions and the accepted December 15, 2015 employment incident.

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear

¹⁰ *S.C., id.; J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *S.C., id.; J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹² *S.C., id.; D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹³ *S.C., id.; J.W.*, *supra* note 10; 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

¹⁴ *Supra* note 6 at Chapter 2.1602.4 (February 2016); *see S.C., id.; Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ 20 C.F.R. § 10.607(b); *see S.C., id.; Debra McDavid*, 57 ECAB 149 (2005).

evidence of error.¹⁶ In his request for reconsideration, counsel indicated that appellant had established the medical component of his claim through reports dated December 18, 2015 from Dr. Antinori and December 23, 2015 from Dr. Carter. He did not provide any additional medical evidence and those reports referenced in his request for reconsideration, as OWCP noted, were not of record at the time of its final decision. The Board thus finds that counsel's argument does not raise a substantial question as to the correctness of OWCP's last merit decision.

Clear evidence of error is intended to represent a difficult standard. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁷ As appellant has not submitted such evidence, the Board finds that he has not demonstrated clear evidence of error.

On appeal, counsel submitted the previously omitted medical records referenced in the statement accompanying his request for reconsideration. However, as previously noted, the Board is precluded from reviewing evidence for the first time on appeal.¹⁸

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

¹⁶ *Supra* note 11.

¹⁷ *S.C., id.; Nancy Marciano*, 50 ECAB 110 (1998).

¹⁸ *Supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board